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AMERICAN ZOO AND  
AQUARIUM ASSOCIATION

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**RE: Protected Species Special Exemption Permits;  
Docket No. 001031304-0304-01**

On behalf of the 201 accredited institutional members of the American Zoo and Aquarium Association (AZA), I respectfully submit the following comments with regard to the National Marine Fisheries Service's (NMFS) proposed regulations for implementation of the Marine Mammal Protection Act (MMPA) Amendments of 1994 (1994 Amendments) affecting marine mammals in public display facilities.

AZA institutions draw over 135 million visitors annually and have more than 5 million zoo and aquarium members who provide almost \$100 million in support. These institutions teach more than 12 million people each year in living classrooms, dedicate over \$50 million annually to education programs, invest over \$50 million annually to scientific research and support over 1300 field conservation and research projects in 80 countries.

#### **AZA GENERAL COMMENTS**

Collectively, AZA members represent the foremost authorities on marine mammal care, husbandry, and behavior. Member institutions also play a critical role in the conservation of marine mammals in the wild through the broad-based education, research, and stranding/recovery/rehabilitation programs briefly outlined below:

#### **Education**

The conservation of marine mammals requires public education, the practice of conservation behaviors by every individual, and the development of effective public policy. The public display of marine mammals plays an integral role in this conservation effort, helping to preserve these magnificent animals for present and future generations. With public display comes marine mammal education and conservation programs unique in their ability to establish a personal connection between visitors and the animals. This personal connection fosters learning about how the behaviors of each and every one of us affect marine mammals and the habitats in which they dwell.



The mission of educational exhibits and programming at AZA member facilities is to enhance the appreciation and understanding of marine mammals and their ecosystems. Members of these zoological institutions instill in those who visit an awareness of ecological and conservation issues and a respect and caring for these animals and their environments. Our members believe this respect engenders a strong, active commitment to marine mammal conservation and an understanding that each and every person can make a difference. Generally, the goals of AZA member education programs are to:

- provide opportunities for visitors to expand their knowledge about marine mammal biology and natural history;
- promote awareness of and sensitivity toward the marine environment;
- present information on marine conservation issues;
- be marine science and environmental information resources to interested citizens, local schools, community groups, and educators, and
- inspire visitors to embrace conservation behavior.

## **Research**

Knowledge acquired through research with animals in public display facilities, in tandem with field research, is another fundamental contribution to marine mammal conservation. Communicating this knowledge is one of the most effective means of ensuring the health of wild marine mammals in the 21st century. Much of this research simply cannot be accomplished in ocean conditions.

Tens of millions of dollars are being spent on research at and by AZA member facilities that is essential in understanding the anatomy and physiology of marine mammals, in treating sick and injured animals from the wild, and in learning to better manage and assist endangered species. Additionally, many AZA facilities collaborate with marine mammal researchers from colleges, universities, and other scientific institutions that conduct studies important to wild species' conservation and health. Over the years, this body of work has contributed significantly to the present knowledge about marine mammal biology, physiology, reproduction, behavior and conservation. These studies have led to improvements in diagnosing and treating diseases; techniques for anesthesia and surgery; tests for toxic substances and their effects on wild marine mammals; and advancements in diet, vitamin supplementation, and neonatal feeding.

## **Stranded Marine Mammals**

For centuries, experts have long been frustrated in their attempt to restore to health the millions of stranded marine mammals found sick and dying on beaches throughout the world. Today, members of AZA have the expertise and ability to offer much needed, practical assistance to these animals. The accumulated knowledge, collective experience, and resources of these facilities are the primary factors in these successful rehabilitation efforts. Indeed, AZA members provide millions of dollars in direct expenditures and in-kind contributions annually to support stranding programs.

## **2001 PROPOSED REGULATIONS**

### **A. Care and Maintenance Standards for Marine Mammals**

In the 1994 Amendments, Congress decided it was wasteful for two agencies to have identical responsibilities and that the public display community should not be subjected to double jeopardy by having two different agencies enforcing care and maintenance standards. Therefore, Congress determined that APHIS would have sole authority over the care and maintenance of animals at public display facilities. We believe the Proposed Regulations reject this Congressional mandate by giving NMFS joint responsibility to enforce APHIS' care and maintenance standards.

Reflecting Congressional intent to have only one agency issuing and enforcing care and maintenance standards, the 1994 Amendments provided that when NMFS issues a public display permit, NMFS' responsibility is restricted to determining whether the public display facility "is registered or holds a license" issued by APHIS pursuant to the Animal Welfare Act ("AWA"). 16 U.S.C. § 1374(c)(2)(A)(ii). The preamble to the Proposed Regulations admits that the "Captive care and maintenance of marine mammals held for public display are now under the sole jurisdiction" of APHIS. 66 Fed. Reg. at 35211. The preamble also states that the 1994 Amendments had the specific effect of "removing the jurisdiction of NMFS over public display captive animal care . . . ." *Id.* Thus, Congress clearly provided that the establishment and enforcement of marine mammal care and maintenance standards is APHIS' responsibility.

The Proposed Regulations attempt to overturn the 1994 Amendments by stating that NMFS' authority is not limited solely to determining if a public display facility has an APHIS registration or license.

**Proposed §216.43(b)(3)(ii), at 35216: For the Office Director to issue a public display permit, the applicant must be registered or hold an exhibitor's license and comply with all applicable Animal and Plant Health Inspection Service standards at 9 CFR subpart E (emphasis added)**

*AZA Response:* The Proposed Regulations can be interpreted to read that NMFS must also independently determine that the facility complies with all of APHIS' care and maintenance standards. Thus, NMFS is claiming it has joint responsibility with APHIS to enforce **APHIS'** care and maintenance standards.

The 1994 Amendments provides no statutory authority, nor does the legislative history of the 1994 Amendments express the will of the Congress to provide for the National Marine Fisheries Service to carry out this responsibility.

**Proposed §216.43(a)(4)(i) at 35216: To facilitate compliance with §216.43: (i) The holder shall allow any designated employee of N O M or any person designated by the Office Director to: (A) Examine any marine mammal held for public display; (B) Inspect all facilities and operations which support any marine mammal held for public display; and (C) Review and copy all records concerning any marine mammal held for public display (emphasis added)**

**AZA Response:** The 1994 Amendments provides no statutory authority, nor does the legislative history of the 1994 Amendments express the will of the Congress to provide for the National Marine Fisheries Service to carry out the responsibilities outlined under §216.43(a)(4) or to assign a designee said responsibilities.

The Proposed Regulations under §216.43 could create the situation whereby APHIS finds a facility in compliance with APHIS' standards, but NMFS, or some private person designated by NMFS, says that APHIS is wrong about APHIS' own regulations --- and NMFS can then either deny the facility the right to display animals or seize the animals.

This was the specific result Congress rejected through the 1994 Amendments. The Proposed Regulations under §216.43 create budgetary questions regarding why Congress would want two agencies enforcing the same statute, particularly when the AWA vests sole enforcement authority with APHIS. They also raise public policy and significant privacy issues regarding why any member of the public designated by NMFS should have the right to inspect facilities for compliance with APHIS standards and to require public display facilities to turn over all of their records.

## **B. Export of Marine Mammals**

Prior to the 1994 Amendments, NMFS required that marine mammals could be exported for public display only if the foreign nation agreed it would afford comity to any decision by NMFS to modify, suspend or revoke said permit. 66 Fed. Reg. at 35213. The 1994 Amendments rejected the NMFS requirement. The 1994 Amendments provided that any person properly holding marine mammals for public display in the United States could export the animals "without obtaining any additional permit or authorization." 16 U.S.C. § 1374(c)(2)(B). However, the 1994 Amendments did address the export issue by stating that a marine mammal could be exported for public display only if the receiving facility met "standards that are comparable to the requirements that a person must meet to receive a permit" under the MMPA for public display. 16 U.S.C. § 1374(c)(9). There are three such standards: the facility must (1) offer a program for education or conservation based on professionally recognized standards of the public display community; (2) have **an** APHIS registration or license<sup>1</sup>; and (3) be open to the public on a regularly scheduled basis with access not limited except by an admission fee. 16 U.S.C. § 1374(c)(2)(A). Congress applied this comparability test only to the facility which receives the animals from the United States and not to subsequent transfers between foreign facilities.

In the 1994 Amendments, Congress recognized the continuing validity of the decision in United States v. Mitchell, 553 F.2d 996, 1003, 1005 (5th Cir. 1977), where the Court held the MMPA does not apply within the territory of a foreign sovereign. A December 10, 1996, opinion from the Office of General Counsel, NOAA, stated the MMPA "does not confer U.S. jurisdiction over marine mammals in the territory of other sovereign states."

**Proposed §216.43(f)(2) at 35219: Persons intending to receive marine mammals for public display by export from the United States must meet the public display criteria at §216.43(b)(3)(i) through (iii).**

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<sup>1</sup> This standard is met through a comparability review by APHIS.

AZA Response: The Proposed Regulations under §216.43(f)(2) amend the statute by replacing the comparability test with the requirement that the foreign facility “must meet the public display criteria at Sec. 216.43(b)(3)(i) through (iii):... .” (emphasis added). However, the requirements of section 216.43(b)(3)(i)-(iii) include not only the three statutory requirements that a facility offer an education or conservation program based on professionally recognized standards, be registered or hold on APHIS license, and be open to the public, but section 216.43(b)(3)(ii) adds NMFS’ newly created requirement that NMFS independently determine that the facility complies with APHIS’ care and maintenance standards.’ The 1994 Amendments provides no statutory authority, nor does the legislative history of the 1994 Amendments express the will of the Congress to provide for the National Marine Fisheries Service to carry out this responsibility.

Proposed §216.43(f)(4)(ii), 66 Fed. Reg. 35219: ...the Office Director must receive a statement from the appropriate agency of the government of the country where is foreign receiver/facility is located certifying that the laws and regulations of the foreign government involved permit that government to enforce requirements equivalent to the requirements of the **US** Marine Mammal Protection Act and Animal Welfare Act.

AZA Response: NMFS employs its newly-created version of the comparability standard to conclude that the agency can prohibit the export of a marine mammal until the government of the country in which the receiving facility is located signs a letter of comity agreeing “to enforce requirements equivalent to the U.S. Marine Mammal Protection Act. . . .”

These “comity” requirements appear to represent **an** effort by NMFS to apply the MMPA internationally, something neither Congress nor the courts allow. The Proposed Regulations raise very serious questions about whether NMFS should be using its limited resources to transform itself into an international regulatory agency.

#### C. The Removal of Animals from the Wild

Although no AZA facility has taken marine mammals from the wild since 1992, it may be necessary to do so in the future in order to maintain genetic diversity among marine mammals within the public display community. The 1994 Amendments provide for this possibility, however the Proposed Regulations would make the removal of marine mammals from the wild extremely difficult, if not impossible.

Proposed § 216.43(b)(3)(v)(B), 66 Fed. Reg. at 35216: For the Office Director to issue a public display permit, the applicant must demonstrate that any proposed permanent removal from the wild is consistent with any applicable quota established by NMFS, or where there is no quota in effect, **will** not have, by itself or in combination with all other known takes and sources of mortality, a significant direct or indirect adverse effect on the protected species or stock, as determined on the basis of the best available information on cumulative take for the species or stock, including information gathered by the applicant concerning the status of the species or stock.

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<sup>2</sup> After requiring absolute compliance, the Proposed Regulations state that the receiving facility must also submit to NMFS a letter from APHIS certifying that the receiving facility meets standards comparable to those of APHIS. Proposed § 216.43(f)(2), 66 Fed. Reg. at 35219.

**AZA Response:** Existing regulations, at 50 C.F.R. 216.34(a)(4) already require a permit applicant to demonstrate that any taking “by itself or in combination with other activities, will not likely have a significant adverse impact on the species or stock . . .” The Proposed Regulations significantly change the existing standard and create an impossible burden to meet. Unlike the existing regulations which require a showing that the taking is not “likely” to have a significant adverse effect on the species, the Proposed Regulations require that the public display community prove a negative-- *i.e.*, that the taking “will not have” a significant adverse effect. Moreover, the Proposed Regulations now require that an applicant prove a negative not only with respect to “direct” effects but also with respect to what NMFS calls “indirect” effects.

The Proposed Regulations establish standards that are virtually impossible to meet. If an applicant attempts to meet the standard, NMFS creates still more obstacles because the Proposed Regulations allow NMFS to require public display facilities to undertake extensive, expensive and time consuming research to gather and analyze population level information and to evaluate every other direct or indirect take or source of mortality. The Proposed Regulations are quite specific that NMFS’ decision on whether to allow the taking is to be based on the best available information “including information gathered by the applicant.” This last clause allows NMFS to require an unending gathering of new information in order to satisfy whatever information thresholds NMFS may establish.

AZA does not object to the existing requirement that its members demonstrate that any removal from the wild is not likely to adversely affect the population at issue. We do, however, object to the wording in the Proposed Regulations that permits NMFS to insist on information gathering that allows the agency to unilaterally alter permit requirements by requesting additional studies before NMFS can make a decision.

**Proposed §216.43(b)(4)(iii)(A) at 35216: Permit holders may not capture or import a marine mammal that is from a species or stock designated as depleted or proposed by NMFS to be designated as depleted (emphasis added).**

The MMPA prohibits the taking of any depleted species. 16 U.S.C. § 1372(b)(3). The Proposed Regulations include this statutory prohibition but then proceed to amend the MMPA by also prohibiting the taking of animals from a species which is “proposed by NMFS to be designated as depleted. . .” In addition, NMFS does not impose upon itself any time limit for reaching a final decision on its proposal to designate a species as depleted.

The 1994 Amendments provides no statutory authority, nor does the legislative history of the 1994 Amendments express the will of the Congress to allow the National Marine Fisheries Service to regulate the take of species or stocks proposed by NMFS to be designated as depleted for public display purposes.

#### **D. Transfer, Reporting and Other Requirements**

The 1994 Amendment provide that a person issued a permit to take or import marine mammals for public display shall have the right “without obtaining any additional permit or authorization” to sell, transport, transfer, etc. the marine mammal to persons who meet the MMPA requirements. 16 U.S.C. § 1374(c)(2)(B). The MMPA also provides that a person exercising these permit rights must notify the Secretary of Commerce no later than 15 days before any sale, transport, etc. 16 U.S.C. § 1374(c)(2)(E).

Proposed § 216.43(e)(1)(i) at 35217: The holder and receiver must submit a completed Marine Mammal Transport Notification (MMTN) together with a supporting Marine Mammal Data Sheet (MMDS) for each marine mammal to be transferred. A completed MMTN includes a MMDS for each animal proposed for transfer and/or transport and a certification signed by both the holder and the receiver which provides that the receiver and/or receiving facility meets the requirements of paragraphs § 216.43(b)(3)(i) through (iii).

Proposed § 216.43(e)(2), 66 Fed. Reg. at 35218: Receivers must provide verification within 30 days of the date of transfer and/or transport. Verifications must include a revised MMDS for each marine mammal..

*AZA Response:* The Proposed Regulations require that the shipping facility provide the statutorily required 15-day transport notice and submit a complete Marine Mammal Data Sheet (“MMDS”) for each mammal to be transferred. The MMDS gives the animal’s official NMFS identification number, name, sex, age, origin, etc. --- information already held in the NMFS inventory. The Proposed Regulations go on to state that in addition to receiving a transport notification and MMDS from the shipping facility, NMFS must also receive a transport notification and another MMDS for the marine mammal from the receiving facility. After the transfer occurs, the receiving facility must confirm the transport and submit yet another MMDS.

Moreover, the Proposed Regulations require that before a transport can occur, both the holder and the receiver must provide NMFS with a certification that the receiver meets the requirements of § 216.43(b)(3)(i)-(iii) of the Proposed Regulations. As noted above, these provisions include requirements that a facility have a conservation or education program, have an APHIS license or registration, be open to the public and be in compliance with all APHIS requirements.

Read together, these provisions mean that a shipping facility is now subject to penalties if NMFS finds, for example, that the receiving facility is not in full compliance with APHIS standards. **An** APHIS determination of compliance with APHIS requirements should be adequate. It is also unnecessary for the shipper and receiver to provide an independent certification, particularly when the MMPA says the transfer may occur without further permit or authorization.

Proposed § 216.43(b)(5) at 35216: All public display permits issued under this subpart shall, in addition to the specific conditions set forth..., contain other conditions deemed appropriate by the Office Director.

*AZA Response:* The Proposed Regulations state that any public display permit issued by NMFS shall “contain other conditions deemed appropriate” by NMFS--a catchall provision apparently authorizing NMFS to issue any additional requirements it might think appropriate. **AZA** believes that all public display permit conditions should be fully disclosed in the regulations in order to provide for consistency and objectivity in the permit process.

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E. Other Issues

Proposed **§ 216.43(e)(4)(vii)** at 35218: ..holders of captive marine mammals must provide an updated MMDS to the Office Director whenever a change in inventory occurs. This updated MMDS must include: If a marine mammal dies, including stillbirths and animals that undergo euthanasia, the holder must notify the Office Director within 30 days of the date of death (emphasis added).

AZA Response: Congress specifically intended that the marine mammal inventory be a record of animals actually held at public display facilities. If the inventory is to be a record of marine mammals held at public display facilities, its only valid purpose should be with respect to living marine mammals. AZA believes that it is neither appropriate nor necessary that the Proposed Regulations require facilities to report stillbirths since such animals will not become part of the inventory of animals at public display facilities. The issue regarding stillbirths is with respect to genetics and public display facilities already report stillbirths to those entities which maintain these genetic records. This section should be deleted as there is no statutory authority to collect stillbirth data.

Thank you for the opportunity to comment on these important proposals. If you require any further information, please contact me at 301/562-0777 ext. 249.

Regards,

Steven G. Olson  
Director, Government Affairs